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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Anthony Gable,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Commissioner of
Social Security,

13 Defendant.
14

No. CV-13-00135-PHX-DGC

ORDER

15 Plaintiff Anthony Gable applied for disability insurance benefits and supplemental
16 security income on August 14, 2009, claiming to have been disabled as of April 28, 2009.
17 Tr. 117-128. The Commissioner denied the application on February 22, 2010. Tr. 105-
18 108. Plaintiff requested a hearing (Tr. 55-56), and appeared before an Administrative
19 Law Judge (“ALJ”) on April 28, 2011 (Tr. 28, 91). The ALJ determined that Plaintiff
20 was not disabled within the meaning of the Social Security Act. Tr. 13-22. The ALJ’s
21 decision became Defendant’s final decision when the Appeals Council denied review on
22 December 6, 2012. Tr. 1-3. Plaintiff then commenced this action for judicial review
23 pursuant to 42 U.S.C. § 405(g). Doc. 1. The parties have not requested oral argument.
24 For reasons that follow, the Court will vacate Defendant’s decision and remand for an
25 award of benefits.

26 **I. Standard of Review.**

27 Defendant’s decision to deny benefits will be vacated “only if it is not supported
28 by substantial evidence or is based on legal error.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d

880, 882 (9th Cir. 2006). “‘Substantial evidence’ means more than a mere scintilla, but less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* In determining whether the decision is supported by substantial evidence, the Court must consider the record as a whole, weighing both the evidence that supports the decision and the evidence that detracts from it. *Reddick v. Charter*, 157 F.3d 715, 720 (9th Cir. 1998). The Court cannot affirm the decision “simply by isolating a specific quantum of supporting evidence.” *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975); *see Robbins*, 466 F.3d at 882.

II. Analysis.

For purposes of Social Security benefits determinations, a disability is “the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 20 C.F.R. § 404.1505. Determining whether a claimant is disabled involves a five-step evaluation. The claimant bears the burden in steps one through four of showing that (1) he is not engaged in a substantial gainful activity, (2) he has a severe medically determinable physical or mental impairment, and (3) the impairment meets or equals a listed impairment or (4) his residual functional capacity (“RFC”) precludes him from performing his past work.¹ If at any step the Commissioner determines that a claimant is or is not disabled, the analysis ends; otherwise it proceeds to step five. The Commissioner bears the burden at step five of showing that the claimant has the RFC to perform other work that exists in substantial numbers in the national economy. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-(v) & 416.920(a)(4)(i)-(v).

The ALJ found at step one that Plaintiff had not engaged in substantial gainful activity since his alleged onset date. Tr. 15. At step two, the ALJ found that Plaintiff

¹ RFC is the most a claimant can do in light of the limitations caused by his impairments. *See Rodriguez v. Bowen*, 876 F.2d 759, 762 (9th Cir. 1989); 20 C.F.R. § 416.945 (a); SSR 96-8p, 1996 WL 374184 (July 2, 1996).

1 suffered from the following severe impairments: chronic obstructive pulmonary disease
2 (“COPD”), deep vein thrombosis (“DVT”), and hypertension. *Id.* The ALJ determined
3 at step three that none of these impairments or their combination met or equaled a listed
4 impairment. Tr. 17. The ALJ then considered the entire record and determined that
5 Plaintiff has the RFC to perform light work as defined in 20 C.F.R. § 404.1567(b) with
6 the following restrictions: lift and carry ten pounds frequently and twenty pounds
7 occasionally; sit, stand, and walk for no more than six hours in an eight-hour workday;
8 avoid working in areas with poor ventilation and around dust, fumes, odors, and gases.
9 Tr. 17. The ALJ concluded that while Plaintiff is not able to perform his past relevant
10 work (Tr. 20), he is not disabled because he has the RFC to perform a full range of light
11 work (Tr. 21).

12 Plaintiff argues that the ALJ erred by improperly rejecting his symptom
13 allegations (Doc. 18 at 19-24) and by improperly weighing medical opinions (*id.* at 12-
14 19). Defendant contends the decision is supported by substantial evidence and free from
15 legal error. Doc. 20 at 10.

16 **A. Plaintiff’s Testimony.**

17 Plaintiff testified that he is 49 years old, divorced, and has two adult children.
18 Tr. 32. Plaintiff stated that he is right-handed and that he completed the tenth grade.
19 Tr. 32-33. Plaintiff stated that he has a valid driver’s license and drives two or three
20 times a week. Tr. 33. Plaintiff testified that he stopped working in April 2009 because a
21 hospital admitted him for a heart attack after he reported chest pains. Tr. 33. Before
22 then, Plaintiff stated that he worked as a truck driver and a forklift operator. Tr. 33-34.

23 Plaintiff testified that he suffers from COPD, a right ankle fracture, carpal tunnel
24 syndrome, depression, anxiety, and concentration difficulties. Tr. 34-35. Plaintiff stated
25 that he had venous thrombosis and was prescribed Coumadin for the condition. Tr. 35.
26 Plaintiff testified that about four times a week he has migraine headaches that last
27 anywhere between twenty minutes and a few hours. Tr. 40. Plaintiff stated that he had
28 Osgood-Schlatter disease as a child and that it still causes him bone pain. Tr. 41.

1 Plaintiff testified that he takes the following medications: Advair, Spiriva inhaler,
2 Nasonex albuterol nebulizer, Proair inhaler, Mucinex oral tablets, 80 milligrams of
3 aspirin, Enalapril, Pantoprazole, Vicodin, acetaminophen, Prozac, and Xanax. Tr. 36-37.
4 Plaintiff stated that he has to wear glasses, but is not concerned with his vision. Tr. 40.

5 Plaintiff testified that walking or sitting for too long exacerbates his pain. Tr. 41.
6 Plaintiff stated that he had been using a walking cane for the past eight months. Tr. 42-
7 43. Plaintiff testified that he could climb one to three steps, but could not climb a flight
8 of stairs. Tr. 37-38. Plaintiff stated that he could walk 30 to 50 yards – with or without
9 his cane – before needing to stop and rest. Tr. 38, 42-43. Plaintiff testified that he can
10 stand still for about an hour, and that he can sit for about 90 minutes before needing to
11 stand. Tr. 38. Plaintiff stated that he could lift about 10 to 15 pounds and carry that same
12 weight for a short distance. *Id.* Plaintiff testified that he could bend over, kneel, and
13 squat, but reported having some trouble returning to a standing position after such
14 movements. Tr. 39. Plaintiff described having problems reaching and pushing with his
15 right arm, but stated that he did not have right-hand grip problems. Tr. 39. Plaintiff
16 stated he has left-hand grip problems because of carpal tunnel syndrome. *Id.* Plaintiff
17 described having an ongoing loss of feeling and sensation in his left hand. Tr. 39-40.
18 Plaintiff stated that he is allergic to dust and most respiratory irritants. Tr. 40.

19 To relieve his pain, Plaintiff testified that he takes his anxiety medication, turns
20 the lights off, sits in a recliner, and puts a towel on his eyes. *Id.* Plaintiff stated that over
21 the course of a day he spends “[a] majority of the time” in a reclining chair. Tr. 46. He
22 also stated that he spends most of his sitting time in a reclined position. *Id.* Plaintiff
23 testified that reclining relieves his chest pressure, and alleviates his ankle pain and
24 migraine headaches. Tr. 47.

25 Plaintiff described having panic attacks that occur about four times a month on
26 anniversary dates of family deaths. Tr. 42. Plaintiff testified that his anxiety causes him
27 to reduce the time he spends communicating with others and makes it difficult for him to
28 meet new people. Tr. 48. Plaintiff stated that he has become introverted and sometimes

1 does not want to leave his apartment because he feels overwhelmed. Tr. 42, 46. Plaintiff
2 stated that it could take him a few hours to pay bills because it is difficult for him to
3 focus. Tr. 46. Plaintiff described suffering from short-term memory loss and stated that,
4 due to these memory problems, a friend helps him write shopping lists and accompanies
5 him to stores. Tr. 44-45.

6 Plaintiff testified that he could not work fulltime as a lobby attendant because he
7 does not have the “physical capacity to take someone and show them where they have to
8 go, and actually probably remembering where I’m sending them.” Tr. 47.

9 The ALJ concluded Plaintiff’s statements concerning the intensity, persistence,
10 and limiting effects of his symptoms were not credible to the extent they are inconsistent
11 with the RFC assessment. Tr. 34. In reaching this conclusion, the ALJ evaluated
12 Plaintiff’s testimony using the two-step analysis established by the Ninth Circuit.
13 *See Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Applying the test of *Cotton v.*
14 *Bowen*, 799 F.2d 1403 (9th Cir. 1986), the ALJ first determined that Plaintiff’s
15 impairments could reasonably produce the symptoms alleged. Tr. 18. Given this
16 conclusion, and because there is no evidence of malingering, the ALJ was required to
17 present “specific, clear and convincing reasons” for finding Plaintiff not entirely credible.
18 *Smolen*, 80 F.3d at 1281. This clear and convincing standard “is the most demanding
19 required in Social Security cases.” *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
20 924 (9th Cir. 2002).

21 The ALJ determined that Plaintiff was “partially credible.” Tr. 20. Plaintiff
22 argues that the ALJ improperly rejected his symptom and disabling limitation. Doc. 18 at
23 20. The Court agrees.

24 The ALJ appears to have partly rejected Plaintiff’s subjective complaints based on
25 inconsistencies in Plaintiff’s testimony. Tr. 18. After summarizing Plaintiff’s symptoms
26 and functional limitation testimony (*id.*), the ALJ appears to have acknowledged
27 Plaintiff’s limitations – “[d]espite these alleged limitations” – and proceeded to
28 summarize Plaintiff’s daily activities testimony (*id.*). The ALJ provided no analysis of

1 how Plaintiff's daily activities conflict with Plaintiff's account of his pain and physical
2 limitations. Defendant argues that the ALJ rejected Plaintiff's claims of disabling
3 limitations because "Plaintiff's own statements regarding his level of functioning
4 indicated that Plaintiff was not as limited as he alleged." Doc. 20 at 16. The Court
5 cannot find, however, that the ALJ made this finding when the extent of the ALJ's
6 explanation was to summarize without analysis portions of Plaintiff's daily activities. An
7 ALJ may properly find a claimant incredible based on his daily activities, *Curry v.*
8 *Astrue*, No. 09-CV-2580-PHX-GMS, 2010 WL 3789535, at *6 (D. Ariz. Sept. 22, 2010);
9 *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002); *Burch v. Barnhart*, 400 F.3d
10 676, 680-81 (9th Cir. 2005), but the ALJ must offer an interpretation of this evidence and
11 explain why it suggests that the claimant's symptom testimony is not credible. The ALJ
12 did not do that here.

13 Defendant argues that the ALJ found that the objective medical evidence did not
14 comport with Plaintiff's symptom allegations and properly discredited Plaintiff's
15 subjective complaints. Doc. 20 at 15. The ALJ did provide a lengthy summary of the
16 medical evidence (Tr. 19-20), but the ALJ did not identify any contradictions between
17 Plaintiff's testimony and this medical evidence, nor did the ALJ make any findings based
18 his recapitulation of the evidence. Accordingly, the Court cannot find that the ALJ
19 rejected Plaintiff's testimony based on a finding that the objective evidence was
20 inconsistent with Plaintiff's testimony. *See, e.g., Connett v. Barnhart*, 340 F.3d 871, 874
21 (9th Cir. 2003) (The Court may not "affirm the ALJ's credibility decision based on
22 evidence the ALJ did not discuss."). The ALJ did not present "specific, clear and
23 convincing reasons" for finding Plaintiff's testimony not credible. *Smolen*, 80 F.3d at
24 1281. The Court finds that the ALJ's rejection of Plaintiff's symptom testimony without
25 proper explanation or analysis was legal error.

26 **B. Medical Opinion Evidence.**

27 "The ALJ must consider all medical opinion evidence." *Tommasetti v. Astrue*,
28 533 F.3d 1035, 1041 (9th Cir. 2008); *see* 20 C.F.R. § 404.1527(d); SSR 96-5p,

1 1996 WL 374183, at *2 (July 2, 1996). The Ninth Circuit distinguishes between the
2 opinions of treating physicians, examining physicians, and non-examining physicians.
3 See *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Generally, an ALJ should give
4 greatest weight to a treating physician's opinion and more weight to the opinions of an
5 examining physician than a non-examining physician. See *Andrews v. Shalala*, 53 F.3d
6 1035, 1040-41 (9th Cir. 1995); 20 C.F.R. § 416.927(d)(1), (2). A treating physician's
7 opinion is not necessarily conclusive of a physical impairment or the ultimate issue of
8 disability. See *Thomas*, 278 F.3d at 957 (citing *Morgan v. Comm'r of Soc. Sec.*, 169 F.3d
9 595, 600 (9th Cir. 1999)).

10 Where the treating physician's opinion is credible and uncontroverted, the ALJ
11 must provide clear and convincing reasons for rejecting it. *Id.* "Where such an opinion is
12 contradicted, however, it may be rejected for 'specific and legitimate reasons that are
13 supported by substantial evidence in the record.'" *Carmickle v. Comm'r, Soc. Sec.*
14 *Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008) (quoting *Lester*, 81 F.3d at 830-31). "The
15 ALJ can meet this burden by setting out a detailed and thorough summary of the facts and
16 conflicting clinical evidence, stating his interpretation thereof, and making findings."
17 *Thomas*, 278 F.3d at 957 (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
18 1989)). Further, "[t]he ALJ need not accept the opinion of any physician, including a
19 treating physician, if that opinion is brief, conclusory, and inadequately supported by
20 clinical findings." *Thomas*, 278 F.3d at 957 (citing *Matney v. Sullivan*, 981 F.2d 1016,
21 1019 (9th Cir. 1992)).

22 **1. Dr. Mark Wagner, M.D.**

23 Dr. Wagner, Plaintiff's treating physician, completed a physical capacities
24 evaluation on April 28, 2010. Tr. 810-14. Dr. Wagner determined that Plaintiff suffers
25 from disabling pain due to a decreased lung capacity and severe headaches. Tr. 812-13.
26 Dr. Wagner opined that Plaintiff's pain and medication side effects moderately affect his
27 attention and concentration capacities. Tr. 814. Dr. Wagner opined that in an eight-hour
28 workday, Plaintiff could sit for four hours and stand or walk for one hour, but must

1 alternate between sitting and standing throughout the day. Tr. 811. Dr. Wagner opined
2 that Plaintiff could never climb, crouch, crawl, or lift, or carry more than 10 pounds;
3 could occasionally balance, stop, kneel, reach above shoulder level, and lift or carry 10
4 pounds or less; and could not be exposed to unprotected heights, dust, fumes, gases, or
5 marked changes in temperature and humidity. Tr. 812. Dr. Wagner also determined that
6 Plaintiff is severely restricted from activities involving moving machinery, and that he is
7 mildly restricted from driving automotive equipment. *Id.* In an April 29, 2010 letter, Dr.
8 Wagner noted that he treats Plaintiff for COPD and migraine headaches and stated that
9 Plaintiff “is unable to work due to impaired respiratory reserves and recurrent headaches
10 affecting concentration.” Tr. 810. Dr. Wagner opined that Plaintiff “is unable to work in
11 gainful employment and I do not see this changing in the foreseeable future.” *Id.*

12 The ALJ gave Dr. Wagner’s treating physician’s opinion “little weight” (Tr. 20),
13 finding that the Dr. Wagner’s opinion was “not supported by objective evidence” and
14 “inconsistent with the record as a whole” (*id.*). The ALJ noted that “Dr. Wagner
15 primarily summarized in the treatment notes [Plaintiff]’s subjective complaints,
16 diagnoses, and treatment, but did not provide objective clinical or diagnostic findings to
17 support the functional assessment.” *Id.* Additionally, as to Dr. Wagner’s opinion that
18 Plaintiff is disabled, the ALJ found that “[a]s an opinion on an issue reserved to the
19 Commissioner, this statement is not entitled to controlling weight and is not given special
20 significance[.]” *Id.*

21 Plaintiff argues that the ALJ erred in giving “little weight” to Dr. Wagner’s
22 opinion. Doc. 18 at 15. Because Dr. Wagner’s opinion is inconsistent with the opinion
23 of Dr. Alec Platt, M.D., Plaintiff’s other treating physician, the ALJ could have properly
24 rejected Dr. Wagner’s contradictory opinion by offering specific and legitimate reasons.
25 *See Carmickle*, 533 F.3d at 1164. Plaintiff argues that the ALJ did not provide specific
26 and legitimate reasons because he “did not explain why Dr. Wagner’s opinion ‘is not
27 supported by objective evidence’” and “did not ‘give good reasons’ for according the
28 opinion of the treating source . . . no weight.” Doc. 18 at 15-16. Plaintiff submits that

1 objective evidence supports Dr. Wagner's opinion, and points to chest x-rays indicating
2 COPD (*id.* at 15 (citing Tr. 899)), pulmonary function studies showing "significant"
3 limitations (*id.* (citing Tr. 832)), a polysomnogram indicating "severe" obstructive sleep
4 apnea (*id.* (citing Tr. 377-84)), electrocardiogram results consistent with ischemia (*id.*
5 (citing Tr. 495-96)), and evidence indicating that Plaintiff underwent cardiac
6 catheterization procedures (*id.* (citing Tr. 428-29, 491-92)). Although Dr. Wagner may
7 have "had access" to this objective evidence (Doc. 18 at 15), Plaintiff has not pointed to
8 anything in Dr. Wagner's medical notes indicating that he relied on this evidence in
9 rendering an opinion. That Dr. Wagner did not support his functional assessment with
10 objective clinical or diagnostic findings is a specific and legitimate reason for the ALJ to
11 have rejected his opinion. *See Batson v. Comm'r*, 359 F.3d 1190, 1195 (9th Cir. 2004)
12 (ALJ did not err in rejecting treating physicians' opinion that "was in the form of a
13 checklist, did not have supportive objective evidence, was contradicted by other
14 statements and assessments of [the claimant]'s medical condition, and was based on [the
15 claimant]'s subjective descriptions of pain"); *Burkhart v. Bowen*, 856 F.2d 1335, 1339-40
16 (9th Cir. 1988) (ALJ properly rejected treating physician's opinion, which was
17 unsupported by medical findings, personal observations, or test reports).²

18 Plaintiff argues that the ALJ erred in rejecting Dr. Wagner's opinion "on issues
19 reserved to the Commissioner," and submits that Dr. Wagner's "assessment of [his]
20 functional limitations is not such an opinion." Doc. 18 at 16. Plaintiff is correct that a
21 treating physician's functional limitations assessment is not an issue reserved to the
22

23 ² Plaintiff notes that "[i]ronically, the ALJ, while rejecting Dr. Wagner's opinions
24 as based on subjective rather than objective evidence, rejected Dr. Vigderman's opinion
25 because he failed to consider [Plaintiff]'s subjective allegations." Doc. 18 at 18. Plaintiff
26 does not argue, however, that it was legal error for the ALJ to have rejected Dr. Wagner's
27 opinion for this reason. The Court found above that the ALJ erred in discounting
28 Plaintiff's subjective complaints and, notwithstanding the ALJ's finding that
"Dr. Wagner primarily summarized in the treatment notes [Plaintiff]'s subjective
complaints" (Tr. 20), the Court concludes that the ALJ's other reasons for rejecting
Dr. Wagner's opinion are specific and legitimate and supported by substantial evidence.

1 Commissioner, but an opinion about whether a claimant would be able to perform
2 fulltime work is such an issue. *See Boardman v. Astrue*, 286 Fed. App'x 397, 399 (9th
3 Cir. 2008); 20 C.F.R. §§ 404.1527(d)(1), 416.927(d)(1). Accordingly, it was not error for
4 the ALJ to have rejected Dr. Wagner's opinion that Plaintiff "is unable to work." As to
5 Dr. Wagner's functional limitations assessment, the Court finds that the ALJ provided
6 specific and legitimate reasons, described above, for discounting that portion of
7 Dr. Wagner's opinion.

8 **2. Dr. Alec Platt, M.D.**

9 Plaintiff's other treating physician, Dr. Platt, examined Plaintiff on October 1,
10 2009. Tr. 831. Pulmonary function testing from that day demonstrated moderate
11 obstruction, normal lung volumes, and moderate emphysema. Tr. 832. Dr. Platt
12 diagnosed Plaintiff with moderate emphysema and COPD, with acute exacerbation;
13 dyspnea; morbid obesity; hypertension; and seasonal allergies. *Id.* Dr. Platt opined that
14 Plaintiff "certainly does have significant limitations based on his pulmonary function
15 testing exam," and determined that Plaintiff "is not disabled from any work" but "seems
16 to be disabled from his prior job[.]" *Id.* The ALJ afforded Dr. Platt's opinion
17 "significant weight" because it "is generally consistent with the record as a whole[.]"
18 Tr. 20.

19 Plaintiff argues that the ALJ erred in affording Dr. Platt's opinion significant
20 weight while rejecting Dr. Wagner's opinion because, unlike Dr. Platt, Dr. Wagner
21 offered specific opinions as to Plaintiff's functional limitations. Doc. 18 at 17. The
22 Court disagrees. The ALJ noted that Dr. Platt "did not specify any specific limitations"
23 (Tr. 20), and found that "this is generally consistent with the record as a whole" (*id.*). An
24 ALJ is generally required to give significant weight to the opinion of a treating physician,
25 and thus the ALJ's decision to rely on Dr. Platt's opinion did not constitute legal error.

26 **3. Dr. Robert Vigderman, M.D.**

27 Dr. Vigderman, a state agency medical consultant, examined Plaintiff on
28 January 28, 2010. Tr. 770-775. He opined that Plaintiff could frequently carry 20

1 pounds and occasionally carry 25 pounds, could not run or climb steps on a regular basis,
2 and otherwise had no functional limitations. Tr. 772-75. The ALJ gave Dr. Vigderman's
3 opinion "little weight" because he found that the "assessment d[id] not adequately
4 consider [Plaintiff]'s subjective complaints[.]" Tr. 20.

5 Plaintiff argues that the ALJ's rejection of Dr. Vigderman's opinion is error.
6 Doc. 18 at 18. Plaintiff submits that ALJ's rejection of Dr. Wagner's opinion because it
7 relied on Plaintiff's subjective complaints is inconsistent with the ALJ's rejection of
8 Dr. Vigderman's opinion because he failed to consider Plaintiff's subjective allegations.
9 The Court concludes, however, that any error in how the ALJ weighed Dr. Vigderman's
10 opinion is harmless because the ALJ imposed more limitations in Plaintiff's RFC than
11 Dr. Vigderman recommended, and these additional limitations benefit Plaintiff.
12 *See Tommasetti*, 533 F.3d at 1038 ("the court will not reverse an ALJ's decision for
13 harmless error, which exists when it is clear from the record that the ALJ's error was
14 inconsequential to the ultimate nondisability determination." (quotation marks and
15 citations omitted)).

16 **III. Remedy.**

17 Having considered the record as a whole, the Court concludes that Defendant's
18 decision denying benefits should be reversed because the ALJ failed to proffer legally
19 sufficient reasons for discounting Plaintiff's subjective complaints. *See Ryan v. Comm'r*
20 *of Soc. Sec.*, 528 F.3d 1194, 1198, 1202 (9th Cir. 2008). The decision to remand for
21 further development or for an award of benefits is within the discretion of the Court.
22 42 U.S.C. § 405(g); *see Harmen v. Apfel*, 211 F.3d 1172, 1177 (9th Cir. 2000). This
23 Circuit has held that evidence should be credited as true, and an action remanded for an
24 award of benefits, where (1) the ALJ has failed to provide legally sufficient reasons for
25 rejecting evidence, (2) no outstanding issues remain that must be resolved before a
26 determination of disability can be made, and (3) it is clear from the record that the ALJ
27 would be required to find the claimant disabled were the rejected evidence credited as
28 true. *See, e.g., Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1400 (9th Cir.

1 1988); *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996); *Benecke v. Barnhart*, 379
2 F.3d 587, 593 (9th Cir. 2004); *Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir. 2007).

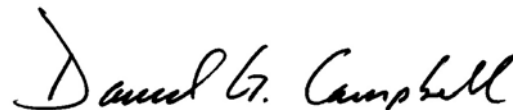
3 After applying the credit-as-true rule to improperly discredited evidence, no
4 outstanding issue remains to be resolved before determining that Plaintiff is entitled to
5 benefits. The ALJ found that Plaintiff's medically determinable impairments could
6 reasonably be expected to cause his alleged pain symptoms (Tr. 18), and Plaintiff
7 testified that, due to his pain, he spends the majority of his days in a reclining chair
8 (Tr. 46). The vocational expert testified that a person who is limited to spending all day
9 in a reclining chair could not work. Tr. 50.

10 Because it is clear that the ALJ would be required to find Plaintiff disabled if his
11 evidence is credited as true, *see Benecke*, 379 F.3d at 593-95, the Court will remand the
12 case for an award of benefits. *See, e.g., D'Angelo v. Astrue*, No. CV-06-3055-PHX-EHC,
13 2007 WL 4617186, at *9 (D. Ariz. Dec. 27, 2007) (remanding for an award of benefits
14 where the vocational expert testified that the claimant's limitations would preclude all
15 work).

16 **IT IS ORDERED:**

- 17 1. Defendant's decision denying insurance benefits is **reversed**.
18 2. The case is **remanded** for an **award of benefits**.

19 Dated this 4th day of September, 2013.

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23 _____
24 David G. Campbell
25 United States District Judge
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